Supreme Court, U.S.
FILED
031352 FEB 09 2004
OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States

MICHAEL BELCASTRO-PETITIONER

v.

CHRISTINE MONEY, WARDEN-RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MR. MICHAEL BELCASTRO
PRO-SE
P.O. BOX 19111
CLEVELAND, OHIO 44119
PHONE NUMBER: 216-289-6731

QUESTION (S) PRESENTED

What exactly constitutes an unreasonable application of a clearly established federal right as determined by this Court, when state and federal courts ignore and rely upon opinions of four dissenting judges in Walter V. United States 447 U.S. 649, 100 S. Ct. 2395, to deny a defendant meaningful review of his Fourth, Sixth, and Fourteenth Amendment Constitutional claims?

When must the doctrine of stare decisis be applied to a case by a reviewing court, state, or federal, when the case being reviewed is indistinguishable from a case previously decided by this Court on a Constitutional question?

Parties

Petitioner, Michael Belcastro, is an individual

Respondent are Christine Money-Warden at Marion Correctional Institution.
Jim Petro, Ohio Attorney General

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CHRISTINE MONEY, WARDEN-RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

IN THE
SUPREME COURT OF THE UNITED STATES PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from federal courts:
The opinion of the United States court of appeals appears in Appendix (i) to The petition and is Unpublished.

JURISDICTION

The judgment order of the U.S. Court of appeals for the sixth circuit was entered on 11-25-03 This petition for writ of certiorari is being files within ninety days of that date. Jurisdiction of this Court is invoked under 28 U.S. C. $1254 (1)

CONSTITUTIONAL AND STATURTORY PROVISIONS INVOLVED

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violates, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT
SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES AND RULES
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STATEMENT OF THE CASE

A jury convicted Petitioner Michael Belcastro of one count of pandering sexually oriented matter involving a minor and one count of illegal use of a minor in nudity-oriented material. Petitioner was sentenced to five years in prison. Petitioner was released on judicial release in September, 2003 after serving four years, 3 month. Petitioner currently is on 5 years intensive probation and classified as a sexually oriented offender for 10 years. The Eighth district court of appeals affirmed the judgment on February 2, 2001, and the Ohio Supreme court denied leave for appeal. Petitioner Michael Belcastro subsequently filed an application to open his direct appeal pursuant to Ohio App. 26 (B) raising a claim of ineffective assistance of trial and appellate counsel for failure to argue and preserve his fourth amendment claim. The Eighth district court of Appeals in their opinion stated: The Walter vs. United States case (1980) 447U.S. 649 100S.Ct. 2395 The United States Supreme Court Case is FLAWED And of Dubious Precedential Value. The Walter Vs. United States is not directly on point to Petitioners case. The Eighth District Also used the dissenting opinion to weasel out of a proper ruling The Eighth District Also used the dissenting opinion to weasel out of a proper ruling. The correct ruling would have excluded the only piece of evidence used to convict Petitioner Belcastro. Also the Eighth District, The trial court, and the police were all fully aware that the evidence which was illegally obtained and Stolen from the privacy of Petitioners own bedroom, Also being aware police took the video back to the police dept and searched it without a proper warrant. Petitioner Michael Belcastro filed his federal habeas corpus petition. The District court dismissed Petitioner's *2254 petition on May, 28 2003, also denying a certificate of appealability, agreeing with the Eighth District Court of appeals saying the U.S. Supreme Is Flawed, and also is a certified question of law, and of great public

interest in the means of justice and our U.S. Constitution, weather or not it was legal to view the video tape with or without a warrant. Petitioner took every precaution to make sure the alleged victim was over eighteen. Even the alleged victim admitted at the trial that she lied and told petitioner she was twenty years old, which is a matter of record and in the trial transcripts. (See tr. 179 and 326) This case is similar to United States Vs.X-Citement video. (1994) 513 U.S. 64, 115 S. Ct. 464. The defendant there was prosecuted for distributing a video involving Traci Lords, who made a number of videos before revealing that she had lied about her age and was seventeen when she made them. The defendant was a video store owner and was prosecuted for under 18 U.S.C. 2252, which prohibits transporting in interstate commerce visual depictions of minors engaged in sexually explicit conduct. The appellate court overturned the conviction and held that the First amendment required that the defendant know both the nature of the material, and that al least one performer was a minor. Since neither of these were elements of the crime, the appellate court concluded that statute was facially unconstitutional. In the case at bar Petitioner asked Mary Jus her age, she showed Petitioner a fake New York State I.D., that later became known at trial to be fake. (See Tr. Pg. 33 and Tr. 433 of trial transcripts.) In this case Richard Zirke, had stolen the video tape from Petitioner's bottom drawer in the privacy of his won bedroom, turned the illegally obtained evidence to the police, the police fully knowing where the tape came from took it back to the police dept and illegally searched the videotape without a proper warrant. Petitioner's Belcastro trial attorney never attempted to call Mr. Richard Zirke to testify at Petitioner's trial, thereby violating his due process rights to a fair trial. It can only be concluded that Petitioner had a First Amendment right to possess the videotape because there was no mens rea or actus reus that a crime has been committed. Petitioner respectfully submits that this case presents a very justifiable issue as to weather he was denied his Sixth Amendment right to effective assistance of counsel at both trial and on appeal, and weather or

not such denial deprived him of his Fourteenth Amendment right to a fair trial, when counsel at both levels defaulted on petitioner's Fourth Amendment claim. Petitioner respectfully asks for justice, and the great public interest of protecting our Constitution from Government Intrusion.

REASONS FOR GRANTING PETITION

Petitioner respectfully submits that a precise reading of the holding in Walter v. Unites States (1980) , 447 U.S. 649, 100 S.Ct. 2395, will clearly demonstrate that the State appellate court's decision is contrary to and involves an unreasonable application of clearly established federal law, as determined by this Court, and that the district court committed clear error in refusing to adhere to its findings, and then the federal Sixth Circuit Court of Appeals further denied meaningful review under the guise that Petitioner failed to meet the standard for obtaining a "Certificate of Appealability."

In, Walter's Mr. Justice WHITE joined by Mr. Justice BRENNAN, concurring in part and in the judgment, "disagreed with the suggestion that it is an open question weather the Government's warrantless projection of the films would have infringed any Fourth Amendment interest if private parties had projected the films before turning them over to the Government." The justices went on to state that, ---"even if the private parties in this action had projected the films before turning them over to the government, the Government still would have been required to obtain a warrant for its subsequent screening of them" Pg. 2403-2404. What has occurred in Walter's is simply a difference in opinions by the justices, and not a holding that if a private party views the film, then it gives police the authority to view it without a warrant. To assume otherwise would have left the open question of the justices unanswered, and therefore, and open question for this Court.

Because Walter's supra is not of "dubious precedential value," as suggested by the State appellate court, affirmed by the district court, and reaffirmed by the Sixth Circuit under the guise that Petitioner failed to meet the standard for obtaining a "Certificate of Appealability", then Walter's is controlling authority which would have been followed under the doctoring of stare decisis.

It is well settled law that, decisions of this Court rendered by written opinions are binding on all courts, state and federal. The Sixth Circuit has continuously held that this Court's holding is stare decisis and cannot be overruled except by this Court itself; even the dicta is of persuasive precedential value. See Jordon V. Gilligan (6th Cir. 1974), 500 F.2d 701; Mongomery V. Carr (6th Cir. 1996), 101 F.3d 1117; United States V. Jacobs (6th Cir. 2001), 24 F.3d 503; Henderson V. Collins 6th Cir. 2001), 262 F3d 615.

Also, this Court has specifically held in Rodrigues Dequijas V. Shearson / American Exp., Inc. (1989), 490 U.S. 477, 109 S. Ct. 1917, that, "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving this Court the prerogative of overruling its own decisions", (emphasis added). It is worth noting that this Court has never overruled nor revisited its decision in Walter's supra, nor has any other court, therefore, its decision is binding authority.

Petitioner contends that has his trial attorney filed a motion to suppress the videotape, he could have arguably had the charges disposed of, or at the very least, the prejudicial evidence used against him suppressed when considering the holding by this Court in Walter supra. Because Petitioner's trial attorney chose to default the herein Fourth Amendment claim, and appellate counsel failed to raise the claim, Petitioner lost the opportunity to obtain direct review under the harmless error standard of Chapman v. California (1967), 386 U.S. 18, 87 S.Ct.

824. This in itself was sufficient reason for appellate counsel to raise and argue on appeal, trial counsel's ineffectiveness in failing to preserve the herein meritorious Fourth Amendment claim.

In the case sub judice, on page 14 of the district court's Opinion and Order, the court relied upon an unreasonable application of clearly established federal law as determined by this Court. The State court also relied upon this unreasonable and erroneous application, when it wrote in its journal entry and opinion; (In pertient part the court held);

> "Indeed, counsel in the exercise of reasonable professionable judgment could have concluded, like the four dissenting judges, that even a partial viewing, revealing the pornographic nature of the videotape, would completely frustrate the expectation of privacy and permit the police to view the tape without a search warrant." (emphasis added)
>
> "Thus, following the admonition of the United States Supreme Court that a court should not second guess the reasonable professional judgments of counsel, this court rules that appellate counsel was not ineffective for not arguing the Walter issue."

Clearly a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects if hindsight, to reconstruct the circumstances of counsel's challenged conduct from consel's perspective at the time. See,

Strickland V. Washington (1984) , 466 U.S. 668, Id at 689, 104

S.Ct. at 2065. This Court has held that in any case presenting an ineffective assistance claim, the performance inquiry must be weather counsel's assistance was reasonable when considering all the circumstances, and in making that inquiry not solely upon the dissenting opinion of four justices of this Court in Walter, which

was done in the instant case. This in itself is reviewable for clear error.

Furthermore, the Sixth Circuit petition, Court of Appeals reviews district court's factual findings only four clear error. See, Martin V. Parker (6th Cir. 1993), 11 F.3d 613. Petitioner contends that the factual findings by the state appellate court, district court, and Sixth Circuit are unreasonable applications of law as determined by this Court in Walter supra.

This Court held in Kimmelman V. Morrison (1986), 477 U.S. 365, 106 S.Ct. 2574 that:

> "Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice."

Clearly, in the case sub judice, for Petitioner the stakes were riding high on a motion to suppress the contents of the videotape, it was simply enormous. Whatever trial counsel's state of mind at the time of trial, he still had a clear legal duty to try and suppress the videotape evidence obtained without a warrant --- and its poisonous fruit. His failure to do so is ineffective assistance under the most strangent analysis, and should have been presented on direct appeal by appellate counsel when it was clearly a matter of record and well settled law handed down by this Court in Walter supra.

This case is not a case where the state agents (police) just came upon contraband, criminal activity, or criminal evidence in plain view. Rather, the record demonstrates that any of the contents of the videotape could not have been discovered by mere plain view inspection. It was only after the police received the videotape from the thief, did the officer take it to the police department and view its contents nine days later without first obtaining a search warrant to view the contents of the videotape

cartridge. This Court has long settled the fact that, "a container which can support a reasonable expectation of privacy may not be searched, even on probable cause without a warrant." See United States V. Ross (1982), 456 U.S. Id at 809-812, 102 S.Ct. Id at 2164-2166.

In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person, this Court held nearly half century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. The exclusionary prohibition extends as well to the indirect products of such invasions. See, Boyd V. United States (1886), 116 U.S. 616, 6 S.Ct. 524; Weeks V. United States 232 U.S. 383, 34 S.Ct. 341; Siverthorne Lumber Co. V. United States (1920), 251 U.S. 385, 40 S.Ct. 182; Wong Sun V. Unites States (1963), 371 U.S. 471, 83 S.Ct. 407. The history of this Court's previous holdings in other cases clearly established Fourth Amendment claim existed and should have been preserved and challenged by appellate counsel.

In 1969, this Court held in Stanley V. Georgia 384 U.S. 557, 569, 89 S.Ct. 1243, 1250 that an individual has an undeniable right to own and possess pornography in the privacy of his own home. Petitioner respectfully submits that despite the fact that he took every conceivable logical precaution to ensure that the allege victim was not a minor prior to exercising his First Amendment right, there was no mens rea or actus reus conceivable on his part. Therefore, it can only be concluded that in the privacy of his home he could have only thought that he was exercising his First Amendment right with two consenting adults, and therefore, has a protected privacy interest in the videotape's contents.

In the case at bar, even the allege victim admitted that she had lied about her age and showed petitioner she was twenty (20) years old when in fact she was only seventeen (17), see Tr.179 and 326. Also, petitioner went as far as to request identification, see Tr.33 and Tr.433. Until the videotape was stolen and police illegally searched its contents, it can only be concluded that

petitioner had a First Amendment right to possess the videotape images, or that a crime had even been committed.

In Nix V. Williams (1984), 467 U.S. 431, 104 S.Ct. 2501, the high court endorsed an additional exception to the basic rule that evidence which has been illegally obtained must be suppressed. The court went on to hold, that when police are in a better position because of their misconduct, the deterrence requires that the advantage be wiped-out through suppression. If on the other hand, the police are aware that discovery is inevitable through lawful means, they have no real need to accelerate discovery through illegal means, as what was done in the case at bar. See, Tr.196 to 204 and also Tr.239 (direct examination of Detective James Baird continued by Ms. Skutnik). Here the police obtained sufficient enough information to legally seek a warrant, but refused to do so until after viewing the contents of the videotape and then the warrant was obtained to search petitioner's home.

Neither Walter supra, nor any of its progeny have been revisited by this Court. Neither by direct action, nor by implication, has this Court reversed its decision in Walter. In all matters concerning the warrantless search of film [and by extension, audio tape, and videotape], Walter continues to be the law of the land. The operative fact upon which Walter supra turns is not the mere viewing of the films, or the unpacking of the sealed envelopes, but rather the extent to which those private activities exposed the incrimination evidence to the plain view of government agents, Justice White and Brennan (for the majority) clearly found that a "private screening of the films would not have destroyed petitioner's privacy interest in them." See Walter supra Id at 100 S.Ct. 2404. A private viewing of the film in Walter, just like the private viewing of the videotape in the case at bar, does not put the images in plain view, but only into the mind of the private viewer. The relevant facts in the case sub judice, clearly demonstrate an unconstitutional search of the contents of petitioner's videotape. Unlike the films in Walter's, it

had no descripted label which even gave a hint as to its contents, and in no conceivable way could have been discovered by mere plain view inspection. Therefore, plain view probable cause was nonexistent to justify a search of its contents without a warrant.

Because the Sixth Circuit relied upon reasons stated by the district court which were erroneous and relied upon four dissenting judges, that decision would be "diametrically different", "opposite in character or nature", and mutually opposed" to this Court's clearly established precedent held in Strickland supra, that a the prisoner need only demonstrate a "reasonable probability that ... the result of the proceeding would have been different", and not upon four dissenting judges in Walter supra. Clearly Walter supra set fourth a clearly established precedent relevant to the Fourth Amendment claim set fourth in this case, that counsel should have recognized and raised. See also, Brumley V. Wingard 6th Cir. 2001), 269 F.3d 629.

Furthermore, this Court recognized in Williams V. Taylor 529 U.S. 362 120 S.Ct. 1495, that when a state-court decision unreasonably applies the law of this Court to the facts of case, a federal court applying 28 U.S.C. § 2254 (d)(1) may conclude that the state-court decision falls within that provision's "unreasonable application" clause. The second circuit has held that, "A state court decision is "contrary to" existing Supreme Court precedent (i) when it applies a rule of law "that contradicts the governing law set fourth in "the Supreme Court cases. See, Lurie V. Wittner (2nd Cir. 2000), 228 F.3d 113, relying on Williams supra, or (ii) when it confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court's] precedent". The Sixth Circuit adopted this well settled principal of law in Fowler V. Collins (2001), 253 F.3d 244, but failed to apply it in the case at bar, thereby, denying petitioner meaningful review of the district court's decision for clear error, and placing a stamp of approval upon the violations

of petitioner's Fourth, Sixth, and Fourteenth Amendment Constitutional rights and leaving them unchecked.

CONCLUSION

Petitioner respectfully submits that in our system of federalism, state courts, like federal courts, have a duty to protect rights secured by the Constitution, however, that is not what has occurred in this case. Rather, although petitioner's meritorious Fourth Amendment claim was previously determined by this Court in Walter supra, it was ignored by state and federal courts based upon an unreasonable application of the clearly established federal right. Surely issues of fact or law turning upon a Constitutional right which was previously resolved by this Court provided sufficient Substance to require a "Certificate of Appealability," or at the very least a reasonable application of this Court's precedent. To assume otherwise is equivalent to saying, there is no need for our Constitution, this Court, or the doctrine of stare decisis.

Wherefore, in conclusion to these particular questions, petitioner respectfully ask, is it too much for him to request and

receive meaningful review of his most basic of Constitutional rights which this Court has previously determined, or a fair consideration of his right to effective assistance of counsel? Surely nothing more is expected and anything less is hypocrisy. What else can it be called when the law speaks to us on one hand about honesty, fair play, and righteousness, and then on the other hand, state and federal courts unceremoniously denies the most basic of Constitutional rights. To further condone these issues would amount to placing a stamp of approval upon the gross miscarriage of justice that has already been ignored by state and federal courts, therefore, petitioner respectfully requests this Honorable Court to consider this case in the interest of justice. It is so prayed for.

APPENDICES

COPY OF ORDER DENYING CERTIFICATE OF APPEALABILITY FROM UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX (i)

United States Court of Appeals
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 532
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

LENOARD GREEN
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Filed: November 25, 2003

Michael Belcastro
P.O. Box 19111
Cleveland, OH 44119

Bruce D. Horrigan
Corrections Litigation Section
615 W. Superior Avenue
11th Floor
Cleveland, OH 44113

RE: 03-3931
Belcastro vs. Money
District Court No. 02-07538

Enclosed is a copy of an order which was entered today in the above styled case.

Jill Colyer
Case Manager

Enclosure
Certified copy of order to:
Honerable John W. Potter
Ms. Geri M. Smith

postage prepaid. The name and addresses of those served are as follows:

Michael Belcastro/ Ohio attorney General Jim Petro 36 East Broad St., Columbus, Ohio 43215

I declare under penalty of perjury that the foregoing is true and correct. Executed on Feb 3, 2004.

Mr. Michael Belcastro

UNUTED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 532
POTTER STEWART U. S. COURTHOUSE
CINCINNATI, OHIO 45202- 3988

Filed: November 25, 2003

Michael Belcastro
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Bruce D. Horrigan
Corrections Litigation Section
615 W. Superior Avenue
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No. 03-3931

UNITED STATED COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL BELCASTRO,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
CHRISTINE MONEY, Warden,	)	
	)	
Respondent-Appellee	)	
	)	

Filed: November 25, 2003

Michael Belcastro, an Ohio prisoner proceeding pro se, applies for a certificate of appealability in his appeal of a district court order and judgment dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. & 2254.

A jury convicted Belcastro of one count of pandering sexually oriented matter involving a minor, and one count of illegal use of a minor in nudity-oriented material. He was sentenced on November 18, 1999, to five years in prison. The Eighth District Ohio Court of Appeals affirmed the judgment on February 2, 2001, and the Ohio Supreme Court denied leave to appeal. Belcastro subsequently filed an application to reopen his direct appeal pursuant to Ohio App. R. 26(B), raising a claim of ineffective assistance of appellate counsel. That application was denied by the Ohio Court of Appeals on May 23, 2002, and the Ohio Supreme Court refused to accept jurisdiction.

Filed November 25, 2003

In his federal habeas corpus petition, Belcastro presented two grounds for relief: (1) ineffective assistance of counsel in direct appeal by counsel's failure to raise
the issue of trial counsel's ineffective assistance in failing to challenge the admission of the videotape; and (2) deprivation of due process by the state courts' failure to apply the doctrine of *stare decisis* regarding a United States Supreme Court opinion.

The district court dismissed Belcastro's & 2254 petition in its entirety in an opinion and order entered on May 28, 2003. A separate judgment was entered the next day. The district court further found that the state courts' determination on the merits of Belcastro's first issue was not contrary to clearly established federal law and so did not warrant federal habeas relief.

An individual seeking a certificate of appealability is required to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. & 2253© (2); *cf. Barefoot v. Estelle,* 463 U.S. 880, 893 (1983). The Supreme Court has held that "[a] petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell,* 537U.S. 322___, 123 S. Ct. 1029, 1033 (2003).

In addition, before a court may issue a certificate of appealability in a case where the & 2254 petition has been denied on a procedural ground without reaching the underlying constitutional claims, the court must find that the petitioner has demonstrated that reasonable jurists could debate whether the petition states a valid claims of the denial of a constitutional right *and* that reasonable jurists could debate whether the district court was correct in its procedural ruling. *See Slack v. McDaniel,* 529 U.S. 473, 484 (200). "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court

erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.*

Upon consideration, the court concludes that Belcastro has not met this standard for the reason stated by the district court. Accordingly, Belcastro's application for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

Lenoard Greene

Clerk
Filed November 25, 2003

No.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner – Appellant,	)	
	)	ORDER
V.	)	
CHRISTINE MONEY, Warden,	)	
Respondent-Applellee	)	

FILED NOV. 25, 2003
LENOARD GREEN, CLERK

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In his federal habeas corpus petition, presented two grounds for relief: (1) ineffective assistance of counsel on direct appeal by counsel's failure to raise the issue of trial counsel's ineffective assistance in failing to challenge the admission of the videotape; and (2) deprivation of due process by the state courts' failure to apply the doctrine of *stare decisis* regarding a United States Supreme Court opinion.

The district court dismissed § 2254 petition in its entirety in an opinion and order entered on May 28, 2003. A separate judgment was entered the next day. The district court found that had failed to exhaust state court remedies regarding his second issue. The court further found that the state courts' determination on the merits of Belcastro's first issues was not contrary to clearly established federal law and so did not warrant federal habeas relief.

An individual seeking a certificate of appealability is required to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *cf. Barefoot v. Estelle,* 463 U.S. 880, 893 (1983). The Supreme Court has held that "[a] petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell,* 537 U.S. 322,___, 123 S. Ct. 1029, 1033 (2003).

In addition, before a court may issue a certificate of appealability in a case where the § 2254 petition has been denied on a procedural ground without reaching the underlying constitutional claims, the court must find that the petitioner has demonstrated that reasonable jurists could debate whether the petition states a valid claim of the denial of a constitutional right
Filed November 25, 2003
and that reasonable jurists could debate whether the district court was correct in its procedural ruling *See Slack v. McDaniel,* 529 U.S. 473, 484 (2000). "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case,

a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petition should be allowed to proceed further." *Id.*

Upon consideration, that court concludes that has not met this standard for the reasons stated by the district court. Accordingly, application for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

Lenord Green
Clerk

Filed November 25, 2003

APPENDIX – (i)

COPY OF OPINION AND ORDER DENYING HABEAS CORPUS

APPENDIX- (ii)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Date Filed March 6, 2003

Michael Belcastro,

Petitioner Case No. 3: 02CV7538

Vs.

Christine Money, Warden,

Respondent JUDGMENT ENTRY

POTTER, J. :

IT IS HEREBY ORDERED AND AJUDGED that the petition for writ of habeas is denied; that petitioner is denied a certificate of appealability and that petitioner is denied leave to file an appeal in form pauperis. Case dismissed.

/s/ John Potter

Sr. United States District Judge

bhorrigan@ag.state.oh.us
(216) 787-3030
(216) 787-3480 Fax

Counsel for Respondent
Christine Money, Warden

Date Filed March 6, 2003

CERTIFICATE OF SERVICE

The aforementioned *Filing of Transcript of proceedings* forwarded to Petitioner Michael Belcastro #385-702, Marion Correctional Institution, P.O. Box 57, Marion, Ohio 43301-0057 by U.S. mail, postage pre-paid this 6th day March, 2003.

Bruce D. Horrigan
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WEDTERN DIVISION

Filed on March 6, 2003

Michael Belcastro,
Petitioner — Case No.3 : 02CV7538
Vs.
Christine Money, Warden,
Respondent — **OPINION AND ORDER**

POTTER, J.:

This action is before the Court on petitioner Michael Belcastro's petition for federal habeas corpus filed pursuant to 28 U.S.C. §2254, respondent's answer, and petitioner's traverse. Petitioner presently is incarcerated in Marion Correctional Institution, in Marion, Ohio.

As an initial matter, the Court finds that the petition may be resolved from the record. Therefore, an evidentiary hearing is not required. Townsend v. Sain, 372 U.S. 293 (1963), Amos v. Scott, 61 F.3d 333, 346 (5th Cir. 1995) ; Rule 8 of Rules Governing Section 2254 Proceedings. Furthermore, for the reasons hereinafter stated, petitioner's habeas petition is denied.

The Cuyahoga County Grand Jury, in its January, 1999 term, handed down an indictment charging Michael Belcastro with one count of pandering sexually oriented matter involving a minor, in violation of Ohio Rev. Code §2907.322; and five counts of illegal use of minor in nudity oriented material, in violation of Ohio Rev. Code §2907.323. Respondent's Exhibit 2. Petitioner initially pled guilty to an amended indictment, but then withdrew the plea. Respondent's Exhibits 3 and 4. On August 30, 1999, a jury trial commenced, and petitioner subsequently filed a motion to suppress twenty boxed of published materials seized from petitioner's residence by police.

Respondent's Exhibits 1 and 5. Petitioner's attorney, during the trial, clarified that the motion to suppress actually was a motion to exclude evidence such as books,
magazines, or anything downloaded from the internet; it was not well taken. Tr. P. 373-
4. Petitioner, at the close of the state's case, moved for acquittal pursuant to Criminal Rule 29, but was granted such only as to count three. Respondent's Exhibit 6; Tr. P. 395.

In a journal entry verdict filed on September 29, 1999, the jury found petitioner guilty of pandering sexually oriented matter involving a minor, as charged in count one, and guilty of illegal use of minor in nudity-oriented material, as charged in count two. Count three was dismissed by the court, and petitioner was found not guilty on counts four, five and six, illegal use of minor in nudity oriented material. Respondent's Exhibit 7. On November 18, 1999, petitioner was sentenced to five years on count one, and six months on count two, to be served concurrently. Respondent's Exhibit 10.

Following the sentencing, the matter was set for a sexual offender classification hearing, and petitioner filed a brief arguing against classification as a sexual predator. Respondent's Exhibit 11. Petitioner was classified as a sexually oriented predator and annual address registration and verification was ordered for ten years. Respondent's Exhibit 12.

Next, petitioner filed a notice of appeal and brief. Respondent's Exhibits 14 and 15. Petitioner alleged six assignments of error:

> ASSIGNMENT OF ERROR NO. 1: The Trial Court erred in instructing the jury that the offense of pandering sexually oriented material involving a minor was a strict-liability offense.
>
> ASSIGNMENT OF ERROR NO. 3: The Trial Court erred in instructing the jury that mistake of age is not a defense to a violation of Ohio R. C. §2907.322.

ASSIGNMENT OF ERROR NO. 4: Ohio R. C. §2907.322 is an unconstitutional infringement upon the Defendant's rights under the First Amendment of the United States Constitution and Article I, Section 11 of the Ohio Constitution, in that is permits a Defendant to be convicted of pandering sexually oriented matter involving a minor without permitting him to show that he reasonably believed that the persons depicted in the materials were not minors.

ASSIGNMENT OF ERROR NO. 5: Defendant was denied a fair trial as a result of ineffective assistance of trial counsel, in violation of the Sixth Amendment of the United States Constitution.

ASSIGNMENT OF ERROR NO. 6: The Trial Court erred in sentencing defendant to other than the minimum terms of incarceration.

Respondent's Exhibit 15. In a journal entry filed on February 26, 2001, the Court of Appeals for Cuyahoga County affirmed the trial court. Respondent's Exhibit 18.

Petitioner, *pro se*, appealed to the Supreme Court of Ohio, asserting six propositions of law:

PROPOSITION OF LAW NO. I

A trial court errors in the admission of certain evidence **(Private collection of commercially produced pornographic magazines)**, when such admission is irrelevant to the charges in violation of Appellant's First and Fourteenth Amendment rights secured under the United States Constitution and Constitution of the State of Ohio.

PROPOSITION OF LAW NO. II

A [] trial court errors in instructing the jury that the offense of pandering sexually oriented material involving a minor is a strict-liability offense when in law its [sic] not, in violation of Appellant's First and Fourteenth Amendment Federal Constitutional rights to a fair trial.

PROPOSITION OF LAW NO. III

A trial court errors in instructing a jury that mistake of age is not a defense to a violation of Ohio R.C. 2907.322, as it is a misapplication of the true legislative intent of the statute's meaning.

PROPOSITION OF LAW NO. IV

Ohio R.C. 2907.322 is an unconstitutional infringement upon a criminal defendant's rights under the First and Fourteenth Amendments of the United States Constitution, in that is permits a Defendant to be convicted of pandering sexually oriented matter involving a minor without permitting him the defense that he reasonably believed, due to taking prudent precautions that the person depicted in the material was not a minor, also in violation of Article I Section 11 of the Ohio Constitution.

PROPOSITION OF LAW NO. V

A Criminal Defendant is denied a fair trial as a result of ineffective
assistance of counsel, in violation of the Sixth Amendment of the United States Constitution and Article I Section 10 of the Ohio Constitution.

PROPOSITION OF LAW NO. VI

A trial court errors in sentencing a criminal Defendant who is a first time offender to other than the minimum terms of incarceration.

Respondent's Exhibit 19. On June 6, 2001, the Supreme Court of Ohio dismissed the appeal as not involving any substantial constitutional question. Respondent's Exhibit 21.

Petitioner, *pro se,* then filed an application to reopen his appeal pursuant to Ohio R. App. P. 26(B). Petitioner's memorandum set fourth the following:

ASSIGNMENT OF ERROR NO. I NOT PREVIOUSLY PRESENTED

DEFFENDANT-APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL DUE TO APPEALLATE COUNSEL'S FAILURE TO ASSIGN AS ERROR THE FACT THAT APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL DUE TO INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, WHEN TRIAL COUNSEL FAILED TO CHALLENGE AND/OR FILE A MOTION TO SUPPRESS A VIDEO TAPE OBTAINED FROM A CRIMINAL WHO COMMITTED A THEFT OFFENCE OF APPELLANT'S PROPERTY FROM THE PRIVACY OF HIS HOME, AND WHEN POLICE SEARCHED ITS CONTENTS WITHOUT FIRST OBTAINING A SEARCH WARRANT, THE CONTENTS OF WHICH WAS USED AGAINST APPELLANT AT TRIAL, THEREBY VIOLATING APPELLANT'S FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS SECURES UNDER THE UNITED STATES FEDERAL CONSTITUTION, AND BECAUSE OF THE AFOREMNTIONED CONSTITUTIONAL RIGHTS BEING VIOLATED APPELLANT'S FIRST AMENDMENT RIGHT AND ARTICLE I SECTION 10, 11, 14, AND 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR II NOT PREVIOUSLY PRESENTED

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN COUNSIL FAILED TO RAISE AS ERROR THAT THE TRIAL COURT COMMITTED PREJUDICAL REVERSIBLE ERROR AMOUNTING TO PLAIN ERROR PURSUANT TO CRIMINAL RULE 52 (B) WHICH DENIED APPELLANT A FAIR TRIAL AND A FAIR OPPORTUNITY TO FULLY PRESENT A DEFENSE A DEFENSE WHEN THE TRIAL COURT CONSIDERED TRIAL COUNSEL'S MOTION FOR BILL OF PARTICULARS NOT RESPONDED TO BY THE STATE TO BE WAIVED, AND THEREBY ORDERED COUNSEL TO CONSOLIDATE IT WITH A CRIM. R. 29 MOTION. ALL IN VIOLATION OF APPELLANT'S RIGHTS SECURED BY ARTICLE I SECTION 16 AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES FECERAL CONSTITUTION.

Respondent's Exhibit 22. On May 23, 2002, the Court of Appeals denied petitioner's application to reopen his appeal. Respondent's Exhibits 24 and 25.

On June 27, 2002, petitioner appealed the denial of his application to reopen his appeal. Respondent's Exhibit 26. In his memorandum in support of jurisdiction of the Supreme of Court of Ohio, petitioner presented two propositions of law:

PROPOSITION OF LAW NO. I

Appellant was denied his Six Amendment Constitutional right to effective assistance of counsel on direct appeal as of right, when counsel failed to raise ineffective assistance of trial counsel for counsel's failure to challenge a blatant Fourth Amendment Constitutional violation, in

violation of rights secured by Article I, Section 10, 14, and [sic] 16 of the Ohio Constitution, and the Fourth, Sixth, and Fourteenth Amendments to the United States Federal Constitution.

PROPOSITION OF LAW NO. II

A Court of Appeals commits prejudicial reversible error when it does not apply the doctrine of stare decisis when a United States Supreme Court opinion is directly on point to the case it is deciding.

Respondent's Exhibit 26. The Supreme Court of Ohio dismissed the appeal as not involving any substantial constitutional question. Respondent's Exhibit 28.

Finally, on November 4, 2002, petitioner filed the instant writ for federal habeas corpus, raising two grounds for relief:

Ground One: PETITIONER WAS DENIED HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL, WHEN COUNSEL FAILED TO RAISE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR COUNSEL'S FAILURE TO CHALLENGE A BLATANT FOURTH AMENDMENT CONSTITUTIONAL VIOLATION, IN VIOLATION OF RIGHTS SECURED BY ARTICLE I SECTION 10, 14, 16 OF THE OHIO CONSTITUTION, AND THE FOURTH, SIXTH, AND FOURTEENTH AMENDMENT TO THE UNITED STATES FEDERAL CONSTITUTION.

Ground Two: THE STATE COURT COMMITS PREJUDICIAL REVERSIBLE ERROR AND DEPRIVES A PETITIONER OF DUE PROCESS, WHEN IT DOES NOT APPLY THE DOCTRINE OF STARE DECISIS WHEN A

UNITED STATES SUPREME COURT OPINION IS DIRECTLY ON POINT TO THE CASE IT IS DECIDING.

Petition, p. 5 and 5(a).

Respondent suggests that petitioner's second ground is a supplemental claim to his first ground. However, because petitioner raised his *stare decisis* argument in the state courts for the first and only time when he appealed the denial of his Rule 26 (B) application to the Ohio Supreme Court, the Court finds that his second ground for habeas relief does not meet the exhaustion requirement established in 28 U.S.C. §2254.[1] Prior to filing a habeas corpus petition, a petitioner must exhaust available state remedies with respect to each issue relied upon in his federal habeas petition, and "[a] n application for a writ of habeas corpus. . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State". *Koontz v. Glossa,* 731 F.2d 365 (6th Cir. 1984); 28 U.S.C. §2254(b) (1) (A). Additionally, submission of a new claim to a state's highest court on discretionary review does not constitute fair presentation of a claim to the state courts. *See Castille v. Peoples,* 489 U.S. 346, 349-51 (1989). Accordingly, petitioner's second ground for habeas corpus relief has not been exhausted, and it hereby is dismissed.

Respondent asserts that petitioner's writ fails on the merits. The Court therefore will review the merits of petitioner's first habeas claim. When the procedural bar has been cleared and a federal court makes a determination on the merits, such court may not grant a writ unless the state court adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of,

---

[1] A federal district court may raise the issue of exhaustion *sua sponte. United States v. Bigler,* 817 F.2d 1139 (5th Cir. 1987); *Brown v. Fauver,* 819 F.2d 395 (3rd Cir. 1987); *Batchelor v. cupp,* 693 F.2d 859 (9th Cir. 1982). A district court errs when it examines unexhausted claims. *Rose v. Lundy,* 455 U.S. 519 (1982).

clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented

in the state court proceeding.

28 U.S.C. §2254 (d).

As the Supreme Court explained, "clearly established Federal law, as determined by the Supreme Court of the United States" refers to the holdings of the Supreme Court, as opposed to its dicta, as of the time of the relevant state court decision. *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 1523 (2000). The Court also explained that a state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* The court further explained that an "unreasonable application" of federal law occurs when "the state court identifies the correct legal principle from this Court's decision but unreasonably applies that principle to the facts of the prisoner's case." *Id.* A federal court may grant a habeas petition if the state court's application is "objectively unreasonable" and not "simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established law erroneously or incorrectly." *Id.* At 1521-22; *see also Harris v. Stovall,* 212 F.3d 940, 942 (6th Cir. 2000).

Petitioner contends that his appellate counsel was ineffective for neglecting to raise trial counsel's failure to argue the admission into evidence of a videotape violated petitioner's fourth amendment rights. An ineffective assistance of counsel claim poses a mixed question of fact and law. *Olden v. United States,* 224 F.3d 561, 565 (6th Cir. 2000). The Sixth Circuit instructs that when reviewing a mixed question, the Court should apply the second clause of 28 U.S.C. §2254 (d) (1), as cited above. *Harpster v. Ohio*, 128 F.3d 322, 326-327 (6th Cir. 1997).

Petitioner presented his ineffective assistance of counsel claim in his Rule 26 (B) applications to reopen his appeal. Because the Ohio Supreme Court dismissed the case without reviewing the merits, the Court of Appeals offered the last reasoned state court decision. The state appellate court applied "clearly established Federal law" as determined by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984); and *Walter v. United States,* 447 U.S. 649, 100 S.Ct. 2395 (1980).

In *Strickland,* the Supreme Court set fourth two components a petitioner must satisfy to establish ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant y the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trail whose result is unreliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687. In order to show that counsel's performance was deficient, petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Id. at 688. Further, in order to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The Supreme Court defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Id. Finally, "[a] appellate counsel is not ineffective simply because he or she decides not to raise every possible argument on appeal." *Wright*

v. United States, 182 F. 3d 458, 466 (6th Cir. 1999) (citing Jones v. Barnes, 463 U.S. 745, 753 (1983)).

When addressing petitioner's underlying contention that his fourth amendment rights were violated when a videotape was admitted into evidence by the trial court, the state appellate court distinguished the case before it from *Walter*. Briefly, the relevant facts indicate that the boyfriend of one of the females appearing in the videotape at issue spent the night in petitioner's residence. While there, the boyfriend discovered,
viewed, and took the videotape belonging to petitioner. The boyfriend subsequently turned over the tape to police, who viewed it without a search warrant. The video was admitted into evidence during petitioner's jury trial. According to petitioner, his counsel was ineffective for not having the videotape suppressed, as the law in *Walter* allegedly provide.

In reviewing petitioner's ineffective assistance of appellate counsel claim in his Rule 26 (B) application, the Court of Appeals of Ohio, County of Cuyahoga, wrote in it's journal entry and opinion:

> In *Walter* the Supreme Court decided a Fourth Amendment issue on the following facts: In September 1975, '12 large, securely sealed packages containing 871 boxes of 8-millimeter film depicting homosexual activity were shipped by a private carrier' from St. Petersburg, Florida to Atlanta, Georgia 477 U.S. at 651. The boxes were addressed to 'Legs, Inc.', but were accidentally shipped to 'L' Eggs Products, Inc.' There employees opened each of the packages and found individual boxes of film, each of which had suggestive drawings and explicit descriptions of their contents. One employee endeavored to look at the film by holding it up to the light, but because the film was so small he could see nothing. The employees then turned the films over to the FBI who viewed them with a projector without obtaining a search warrant.

On appeal to the Supreme Court of the United States in a plurality opinion...[the Court] ruled that the FBI's examination of the film without a search warrant violated the Fourth Amendment and the defendant's expectation of privacy . . . . This opinion first noted that the films were properly in the hands of the government even a wrongful search or seizure by a private party does not deprive the government of the right to use such evidence if the private party turns the evidence over to the government. There is 'nothing wrongful about the Government's acquisition of the packages of its examination of their contents to the extent that they had already been examined by third parties.' 477 U.S. at 656. . . . In this case the justices concluded that because the scope of the search, viewing the films with a projector, exceeded the scope of the private search, a search warrant was requires. . . .

[B]oth trial and appellate counsel in the exercise of reasonable professional judgment could have concluded that the boyfriend's viewing of the tape completely frustrated Mr. Belcastro's expectation of privacy in it. The tape actually contained both the first photo session with Ms. Helmick, which Mr. Belcastro surreptitiously taped, and the second photo session with Ms. Helmick and the seventeen year old. When the boyfriend contacted the police about the tape, he told them that he had a tape depicting a minor engaged in sexual activity which he wanted to turn over to them. This indicated that he had viewed the entire tape. (Tr. Pg. 196.) In *Walter* Justice Stevens had written that there would be nothing wrongful with the government's examination of the contents of a package 'to the extent that they had already been examined by third parties.' 477 U.S. 656. Because it appeared that the boyfriend had already

> examined the entire tape, the government's reviewing of it would not further frustrate Mr. Belcastro's expectation of privacy. Indeed, counsel in the judgment could have concluded, like the four dissenting judges, that even a partial viewing, revealing the pornographic nature of the videotape, would completely frustrate the expectation of privacy and permit the police to view the tape without a search warrant.
>
> Thus, following the admonition of the United States Supreme Court that a court should not second guess the reasonable professional judgments of counsel, this court rules that appellate counsel was not ineffective for not arguing the *Walter* issue.

Respondent's Exhibit 24

Petitioner has failed to put forth a convincing argument that the state appellate court's judgment on the merits was contrary to clearly established federal law. Therefore, petitioner's ground for habeas corpus relief is without merit and not well taken.

Further, for the foregoing reasons, the Court certifies, pursuant to 28 U.S.C. § 1915 (a) (3), that an appeal from this decision could not be taken in good faith, *see* Fed. R. App. P. 24(a), and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253 (c); Fed. R. App. P. 22(b); *Slack v. McDaniel,* 120 S.Ct. 1595, 1603-4, (2000); *Lyone v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1073 (6th Cir. 1997).

THEREFORE, for the foregoing reasons, good cause appearing, it is ORDERED that the petition for writ of habeas corpus be, and hereby is, DENIED; and it is FURTHER ORDERED that petitioner is denied a certificate of appealability; and it is FURTHER ORDERED that petitioner is denied leave to file an appeal in *forma pauperis.*

Filed March 6, 2003

/s/ John W. Potter
Sr. United States District Judge

EIGHTH DISTRICT COURT OF APPEALS DECISION DENYING APP.R.26 (B)

APPENDIX – (iii)

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst Clerk of Courts

State of Ohio
Appellee COA No. Lower Court No.
77443 CP CR-371705
Commons Pleas Court

REVEIVED FOR FILE
MAY 23 2002
Gerale E. Fuerst
Clerk of the Court of Appeals

VS.
Michael Belcastro
Appellant Motion No. 28046

Date 5/23/02
Journal Entry
APPELLANT'S, PRO SE, TIMELY APPLICATION FOR REOPENING OF DIRECT APPEAL PURSUANT TO APPELLATE RULE 26(B) IS DENIED. SEE JOURNAL ENTRY AND OPINION OF SAME DATE.

Judge PATRICIA A. BLACKMON, Concurs
Judge ANN DYKE, Concurs

JAMES D. SWEENEY
Presiding Judge

OHIO SUPREME COURT'S DENIAL
OF APP.R.26 (B)
APPEAL

APPENDIX – (iv)

The Supreme Court of Ohio

State of Ohio Appellee,	:	Case No. 02-1096
Michael Belcastro Appellant,	:	ENTRY Filed September 4, 2002 Marsha J. Mengel, Clerk Supreme Court of Ohio

Upon Consideration of the jurisdictional memoranda in this case, the Court dismisses the appeal as not involving any substantial constitutional question.

Docket Fee, Affidavit of Indigence filed.

(Cuyahoga County Court of Appeals: No. 77443)

Thomas J. Moyer
Chief Justice

COPY OF WALTER VS. UNITED STATES 477 U.S. 649

APPENDIX – (iiv)

U.S. Supreme Court
WALTER v. UNITED STATES, 447 U.S. 649 (1980)
447 U.S. 649

WALTER v. UNITED STATES.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.
No. 79-67.

Argued February 26, 1980.
Decided June 20, 1980.*

[Footnote*] Together with No. 79-148, Sanders et al. v. United States, also on certiorari to the same court.

When an interstate shipment of several securely sealed packages containing 8-millimeter films depicting homosexual activities was mistakenly delivered by a private carrier to a third party rather than to the consignee, employees of the third party opened each of the packages, finding individual film boxes, on the side of which were suggestive drawings, and on the other were explicit descriptions of the contents. One employee opened one or two of the boxes and attempted without success to view portions of the film by holding it up to the light. After the Federal Bureau of Investigation was notified and picked up the packages, agents viewed the films with a projector without first making any effort to obtain a warrant or to communicate with the consignor or the consignee of this shipment. Thereafter, petitioners were indicted on federal obscenity charges relating to the interstate transportation of certain films in the shipment, a motion to suppress and return the films was denied, and petitioners were convicted. The Court of Appeals affirmed, and rehearing was denied.

The judgments are reversed. Pp. 653-660; 660-662.

Certiorari dismissed in part; 592 F.2d 788 and 597 F.2d 63, reversed.

MR. JUSTICE STEVENS, joined by MR. JUSTICE STEWART, concluded that even though the nature of the contents of the films was indicated by descriptive material on their individual containers, the Government's unauthorized screening of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances. Cf. Stanley v. Georgia, 394 U.S. 554, 569 (STEWART, J., concurring in result). Pp 653-660.

(a)The fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents. An officer's authority to possess a package is distinct from his authority to examine its contents, and when the contents of the package are books or other materials arguably protected by the First Amendment, and the basis for the seizure is disapproval of the message contained therein, it is especially important that the Fourth Amendment's warrant requirement be scrupulously observed. Pp. 654-655.

(b) Nor does the fact that the packages and one or more of the boxes had been opened by a private party before they were acquired by the FBI excuse the failure to obtain a search warrant. Even though some circumstances – for example, if the results of the private search are in plain view when materials are turned over to the Government – may justify the Government's re-examination of the materials, the Government may not exceed the scope of the private search unless it has the right to make an independent search. Here, the private party had not actually viewed the films, and prior to the Government screening one could only draw inferences about what was on the films. Thus, the projection of the films was a significant expansion of the previous search by a private party and therefore must be characterized as a separate search, which was not supported by

any exigency or by a warrant even though one could have easily been obtained. Pp. 656-657.

(c) The fact that the cartons of film boxes, which cartons were securely wrapped and had no markings indicating the character of their contents, were unexpectedly opened by a third party before the shipment was delivered to its intended consignee, thus uncovering the descriptive labels on the film boxes, does not alter the consignor's legitimate expectation of privacy in the films. The private search merely frustrated that expectation in part and did not strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection. Pp. 658-659.

MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN, concurring in part and in the judgment, agreed that the Government's warrantless projection of the films constituted a search that infringed petitioners' Fourth Amendment interests even though the Government had acquired the films from a private party, but disagreed with the suggestion that it is an open question whether the Government's projection of the films before turning them over to the Government. The notion that private searches insulate from Fourth Amendment scrutiny subsequent governmental searches of the same or lesser scope is inconsistent with traditional Fourth Amendment principles, and even if the private parties in this action had projected the films before turning them over to the Government, the Government still would have been required to obtain a warrant for its subsequent screening of them. Pp. 660-662.

MR. JUSTICE MARSHALL concurred in the judgment. [447 U.S. 649, 651]

STEVENS, J., announced the judgment of the Court and delivered an opinion, in shich STEWART, J., joined. WHITE, J., filed an opinion concurring in part and in the judgment, in which BRENNAN, J., joined, post, p. 660. MARSHALL, J., concurred in the judgment. BLACKMUN, J., filed a dissenting opinion, in

which BURGER, C.J., and POWELL and REHNQUIST, JJ., joined, post, p. 662.

W. Michael Mayock argued the cause and filed a brief for petitioner in No. 79-67. Glenn Zell argued the cause and filed a brief for petitioners in No. 79-148.

Elliott Schulder argued the cause for the United States in both cases. With him on the brief were Solicitor General McCree, Assistant Attorney General Heymann, Jerome M. Feit, and Patty Merkamp Stemler.

MR. JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE STEWART joined.

Having lawfully acquired possession of a dozen cartons of motion pictures, law enforcement officers viewed several reels of 8-millimeter film on a Government projector. Labels on the individual film boxes indicated that they contained obscene pictures. The question is whether the Fourth Amendment required the agents to obtain a warrant before they screened the films.

Only a few of the bizarre facts need to be recounted. On September 25, 1975, 12 large, securely sealed packages containing 871 boxes of 8-millimeter film depicting homosexual activities were shipped by private carrier from St. Petersburg, Fla., to Atlanta, Ga. The shipment was addressed to "Leggs, Inc.," 1 but was mistakenly delivered to a substation in the suburbs of Atlants, where "L'Eggs Products, Inc.," regularly received deliveries. Employees of the latter company opened [447 U.S. 649, 652] each of the packages, finding the individual boxes of film. They examined the boxes, on one side of which were suggestive drawings, and on the other were explicit descriptions of the contents. One employee opened one or two of the boxes, and attempted without success to view portions of the film by holding it up to the light. 2 Shortly thereafter, they called

a Federal Bureau of Investigation agent who picked up the packages on October 1, 1975.

Thereafter, without making any effort to obtain a warrant or to communicate with the consignor or the consignee of the shipment, FBI agents viewed the films with a projector. The record does not indicate exactly when they viewed the films, but at least one of them was not screened until more than two months after the FBI had taken possession of the shipment. 3

On April 6, 1977, petitioners were indicted on obscenity charges relating to the interstate transportation of 5 of the 871 films in the shipment. A motion to suppress and return the films was denied, and petitioners were convicted on multiple counts of violating 18 U.S.C.371, 1462, and 1465. Over Judge Wisdom's dissent, the Court of Appeals for the Fifth Circuit affirmed, 592 F.2d 788, and rehearing was denied, 597 F.2d 63 (1979). We granted certiorari, 444 U.S. 914, 4 and now reverse. [447 U.S. 649, 653]

In his concurrence in Stanley v. Georgia, 394 U.S. 557, 569, MR. JUSTICE STEWART expressed the opinion that the warrantless projection of motion picture films was an unconstitutional invasion of the privacy of the owner of the films. After noting that the agents in that case were lawfully present in the defendants home pursuant to a warrant to search for wagering paraphernalia, MR. JUSTICE STEWART wrote:

"This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence in plain view. For the record makes clear that the contents of the films could not be determined by mere inspection...After finding them, the agents spent some 50 minutes exhibiting them by means of the appellant's projector in another upstairs room. Only then did the agents return downstairs and arrest the appellant.

"Even in the much- criticized case of the United States v. Rabinowitz, 339 U.S. 56, the Court emphasized that exploratory searched...cannot be undertaken by officers with or without a

warrant. Id., at 62. This record presents a bald violation of that basic constitutional rule. To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches an indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant.

"Because the films were seized in violation of the Fourth Amendments, they were inadmissible [447 U.S. 649, 654] in evidence at the appellant's trail." Id, at 571-572 (footnote omitted)

Even though the cases before us involve no invasion of the privacy of the home, and notwithstanding that the nature of the contents of these films was indicated by descriptive material on their individual containers, we are nevertheless persuaded that the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was not warrant; the owner had not consented; and there were no exigent circumstances.

It is perfectly obvious that the agent's reason for viewing the films was to determine whether their owner was guilty of a federal offense. To be sure, the labels on the film boxes gave them probable cause to believe that the films were obscene and that their shipment in interstate commerce had offended the federal criminal code. But the labels were not sufficient to support a conviction and were not mentioned in the indictment. Further investigation-that is to say,a search of the contents of the films-was necessary in order to obtain the evidence which was to be used at a trial.

The fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents. Ever since 1878 when Mr. Justice Field's opinion for the Court in Ex parte Jackson, 96 U.S. 727, established that sealed packages in the mail cannot be opened without warrant, it has been settled

that an officer's authority to possess a package is distinct from his authority to examine its contents. 5 See Arkansas v. Sanders, 442 U.S. 753, 758; United [447 U.S. 649,655] States v. Chadwick, 433 U.S. 1, 10. When the contents of the package are books or other materials arguably protected by the First Amendment, and when the basis for the seizure is disapproval of the message contained therein, it is especially important that this requirement be scrupulously observed. 6 [477 U.S. 649, 656]

Nor does the fact that the packages and one or more of the boxes had been opened by a private party before they were acquired by the FBI excuse the failure to obtain a search warrant. It has of course been settled since Burdeau v. McDowell, 256 U.S. 465, that is wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and that such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully. See Coolidge v. New Hampshire, 403 U.S. 443,487, -490. In these cases there was nothing wrongful about the Governments acquisition of the package or its examination of their contents to the extent that they had already been examined by third parties. Since that examination had uncovered the labels, and since the labels established probable cause to believe the films were obscene, the Government argues that the limited private search justified an unlimited official search. The argument must fail, whether we view the official search as an expansion of the private search or as an independent search supported by its own probable cause.

When an official search is properly authorized – whether by consent or by the issuance of a valid warrant-the scope of the search is limited by the terms of its authorization. 7
Consent [447 U.S. 649, 567] to search a garage would not implicitly authorize a search of an adjoining house; a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers. Because " indiscriminate searches and seizures conducted under the authority of general warrants were the immediate evils that motivated the framing and adoption of the Fourth Amendment, "Payton v. New York, 445 U.S. 573, 583,

that Amendment requires that the scope of every authorized search be particularly described.8

If a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied to any official use of a private party's invasion of another person's privacy. Even though some circumstances-for example, if the results of the private search are in plain view when materials are turned over to the Government may not exceed the scope of the private search unless it had the right to make an independent search. In these cases, the private party had not actually viewed the films. Prior to the Government screening, one could only draw inferences about what was on the films. 9 The projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search. That separate search was not supported by any exigency, or by a warrant even though one could have easily been obtained. 10[447 U.S. 649,658]

The Government claims. However, that because the packages had been opened by a private party, thereby exposing the descriptive labels on the boxes, petitioners no longer had any reasonable expectation of privacy in the films, and that warrantless screening therefore did not invade any privacy interest protected by the Fourth Amendment . But petitioners expected no one except the intended recipient either to open the 12 packages or to project the films. The 12 cartons were securely wrapped and sealed, with no labels or marking to indicate the character of their contents. 11 There is no reason why the consignor of such a shipment would have lesser expectation of privacy than the consigners of an ordinary locked suitcase. 12 The fact that the cartons were unexpectedly [447 U.S. 649,569] opened by a third party before shipment was delivered to its intended consignee does not alter the consignors legitimate expectation of privacy. The private search merely frustrated that expectation of all Fourth Amendment protection. 14 Since additional search conducted by the FBI-the screening of the films was not supported by any justification, it violated that Amendment.

We therefore conclude that the rationale of MR. JUSTICE STEWART'S concurrence in Stanley v. Georgia, 394 U.S. 557, [447 U.S. 649, 660] is applicable to these cases and that it requires that the judgments of the Court of Appeals be reversed.

It is so ordered.

Mr. JUSTICE MARSHALL concurs in the judgment

Footnotes

[Footnote] There was no "Leggs, Inc." "Leggs" was the nickname of a woman employed by one of petitioners' companies. The packages indicated that the intended recipient would pick them up and pay for them at the carrier's terminal in Atlanta.

[Footnote2] Each reel was eight millimeters in width. Petitioner Walter informs us that, excluding three millimeters for sprocketing and one millimeter for the border, the film itself is only four millimeters wide. Brief for Petitioner in No. 79-67, p. 30, n. 8. Since the scenes depicted within the frame are necessarily even more minute, it is easy to understand why such films cannot be examined successfully with the naked eye.

[Footnote 3] The FBI had meanwhile received no request from the consignee or the consignor of the films for their return, but the agents had been told by employees of L'Eggs Products, Inc., that inquires had been made as to their whereabouts.
[Footnote 4] The petition for certiorari in No. 79-67 presented 10 separate questions, and the petition in No. 79-148 presented 5 separate questions. [477U.S. 649,653] Except with respect to the issues discussed in the text, we have determined that certiorari was improvidently granted. We therefore dismiss as to the other questions that have been briefed and argued. For purpose of decision, we accept the Governments argument that the delivery

of the films to the FBI by a third party was not a "seizure" subject to the warrant requirement of the Fourth Amendment.]

[Footnote 5] In th[e] enforcement [of regulations as to what may be transported in the mails], a distinction is to be made between different kinds of mail matter, between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open t condition to be examined. Letters and [447 U.S. 649,653] sealed packages of this kind in the mail are as fully guarded from examination an in section, except as to their outward forma and weight , as if they were retained by the parties forwarding them to their own domiciles. The constitutional guaranty of the right of the people to be secure in papers against unreasonable search and seizures extends to opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution" 96 U.S. at 732-733.

And later in his opinion , Mr. Justice Field again noted that" regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letter, or sealed packages subject to letter postage, without warrant, issued upon oath or affirmation, in the search for prohibited matter..."Id., at 735.

[Footnote 6] "This is the history which prompted the Court less than four years ago to remark that [t]he use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new. Marcus v. Search Warrant, 367 U.S. 717, at 724. This history was, of course part of the intellectual matrix within which our constitutional fabric was shaped. The Bill of Rights was fashioned against the

background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. Id., at 729. As MR. JUSTICE DOUGLAS has put it ' the commands of our first amendment 9as well as the prohibitions of the Fourth and the Fifth) reflect the teachings of Entick v. Carrington [19 How St.Tr 1029 (1765)]. These three amendments are indeed closely related, safeguarding not only private and protection against self-incrimination [447 U.S. 649, 656] but "conscience and human dignity and freedom of expression as well" Frank v. Maryland, 359 U.S. 360, 376 (dissenting opinion)

" In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'thins to be seized' is to be accorded the most scrupulous contain;" Stanford v. Texas, 379 U.S. 476,484-485

See also Roaden v. Kentucky, 413 U.S. 496,501. Although there were 871 reels of film in the shipment, there were only 25 different titles. Since only five of the titles were used as a basis for prosecution, it may be presumed that the other films were not obscene.

[Footnote 7] " The requirement that warrants shall particularly describe the things to be seized makes general searched under them impossible and prevents the seizure of one thing under a warrant describing another. 'Marron v. United States, 275 U.S, 192, 196.

[Footnote 8] The Warrant Clause of the Fourth Amendment expressly provides that no warrant may issue except those "particularly describing the place searched, and the persons or things to be seized."

[Footnote 9] Since the viewing was first done by the Government when screened the films were obscene clearly cannot excuse the failure to obtain a [447 U.S. 649, 659] warrant;

for if probable cause dispensed with the nexissity of a warrant had the private party been the first to view them.

[Footnote 10] The fact that the labels on the boxes established probable cause to believe the films were obscene clearly cannot excuse the failure to obtain a [477 U.S. 649, 658] warrant; for probable cause dispensed with the necessity of a warrant, one would never be needed.

Contrary to dissent, post, at 665-666, n. 3, there were no impracticalities in these cases that would vitiate the warrant requirement, The inability to serve a warrant on the owner of property to be searched does not make execution of the warrant requirement unlawful. See ALI, Model of Pre- Arraignment Procedure 220.3(4) (Prop. Off. Draft 1975). Obviously , such inability does not render a warrant unnecessary under the Fourth Amendment. Nor is it clear in these cases that it would have been impossible to serve petitioners with search warrant had the FBI made any effort to find them prior to screening the films. See n. 3, supra.

[Footnote 11] For the same reason, one may not deem petitioners to have consented to the screening merely because the labels on the unexposed boxes were explicit.

Nor can petitioners' failure to make a more prompt claim to the Government for return of the films be fairly regarded as an abandonment of their interest in preserving the privacy of the shipment. As subsequent events have demonstrated, such a request could reasonably be expected to precipitate criminal proceedings. We cannot equate an unwillingness to invite a criminal prosecution with a voluntary abandonment of any interest in the contents of the cartons. In any event, the record in these cases does indicate that the defendants made a number of attempts to locate the films before they were examined by the FBI agents.

[Footnote 12] The consignor's expectation of privacy in the contents of a carton delivered to a private carrier must be measured by the condition of the package at the time it was shipped unless there is reason to assume that {477 U.S. 649, 659] it would be opened before it arrived at its destination. Thus, for example, if a gun case is delivered to a carrier, there could then be no expectation that the contents would remain private, cf. Arkansas v. Sanders, 442 U.S. 753, 764-765, n. 13; but if the gun case were enclosed in a locked suitcase, the shipper would surely expect that the privacy of its contents would be respected.

The dissent asserts, post, at 665, that [a]any subjective expectation of privacy on the part of petitioners was undone.. by their own actions and private search." But it was difficult to understand how petitioners subjective expectation of privacy could have been altered in any way subsequent events of which they were obviously unaware.

[Footnote 14] It is arguable that a third party's inspection of the contents of ' private books, papers, memoranda etc., could be so complete that there would no additional search by the FBI when it reexamines the materials. Cf. Burdeau v. McDowell, 256 U.S. 465, 470. But this is not such a case, because it was clearly necessary for the FBI to screen the films, which the private party had not done, in order to obtain the evidence needed to accomplish its law objectives.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, concurring in part and concurring in the judgment.

I agree with MR. JUSTICE STEVENS that the Governments warrantless projection of the films constituted a search that infringed petitioners Fourth Amendment interests despite the fact that the Government had acquired the films from a private party. 1 I write separately, however ,because disagree with MR. JUSTICE STEVENS suggestion that it is an open question whether the governments projection of the films would have

infringed any Fourth Amendment interest if private parties had projected the films before turning them over to the Government, ante, at 657, n.9. f. The notion that private searches insulate from Forth Amendment scrutiny subsequent governmental searches of the same or lesser scope is inconsistent with traditional Fourth Amendment principles. Nor does it follow from our recognition in Burdeau v. McDowell, 256 U.S. 465 (1921), and Coolidge v. New Hampshire, 403 U.S. 443, 487-490 (1971), that the Fourth Amendment proscribes only governmental action. 2 [447 U.S. 649, 661]

I agree with MR. JUSTICE STEVENS that there was 'nothing wrongful" about the Government's examination of the contents of the packages that had been opened by private parties. When the private parties turned the films over to the Government , the packages already had been opened, and the Government saw no more the what was exposed to plain view. No Fourth Amendment interest was implicated by this conduct because the opening of the packages, cannot be attributed to the Government and considered a governmental search. 3 As the Court noted in Coolidge v. New Hampshire, supra, at 489, where a private party produced evidence for government inspection, " it was not incumbent on the police to stop her or avert their eyes."

This does not mean, however, that the Government subsequently may contact the same kind of search that private parties have conducted without implicating Fourth Amendment interests. The contrary view would permit Government agents to conduct warrantless searches of personal property whenever probable cause exists as a result of a prior private search. We have previously held, however, that police must obtain a warrant before searching a suspect's luggage even [477 U.S, 649, 662] if they have probable cause to believe that it contains contraband. Arkansas v. Sanders, 422 U.S. 753 (1979); United States v. Chadwick, 443 U.S. 1 (1977). The fact that such probable cause may be the product of private search would not alter the need to comply with the warrant requirement. Thus, if the private parties in these cases had projected the films before turning them over to

the Government, the Government still would have been required to obtain a warrant for its subsequent screening of them. Unlike the opening of expectation was infringed by the Government's unauthorized screening of them. As MR. JUSTICE STEVENS recognizes, petitioners possessed a legitimate expectation of privacy in the films, and this expectation was infringed by the Government's unauthorized screening of them. Unlike the opening of the packages that destroyed their privacy by exposing their contents to the plain view of subsequent observers, a private screening of the films would have destroyed petitioner's privacy interest in them. Thus the Government's subsequent screening of the films constituted an independent governmental search that would have infringed petitioner's Fourth Amendment interests without regard to any previous screening by private parties.

I therefore concur in part and in judgment

[Footnote 1] Although MR. JUSTICE STEVEN'S refers to the films as having been lawfully acquired by the Government, ante, at 651,656, I note that he does not reach the question whether the Government's acquisition of the films was 'seizure" subject to the warrant requirement of the Fourth Amendment, ante,at 653 n. 4, a question on which Court of Appeals was divided. 592 F 2d 788,792-793,800-802 (CA5 1979). Likewise , I do not address this question.

[Footnote 2] Neither Burdeau v. McDowell nor Coolidge v. New Hampshire supports the proposition that private searched inslate subsequent governmental searches from the Fourth Amendment scrutiny. In Burdeau the Court held that the actions of a private party in illegally seizing evidence will not be attributed to the Government for the Fourth Amendment purposes [477 U.S. 649,661] when private party turns the evidence over to the Government. The Court noted that because "no official of the federal Government had anything to do with the wrongful seizure of the petitioner's property,...[i]it is unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another. " 256 U.S. at 475.

Similarly, in Coolidge v. New Hampshire, the Court held that a wife's voluntary action in turning over to police husband's guns and clothing did not constitute a search and seizure by the government. 403 U.S. at 487-490

[Footnote 3] Because the private party's opening of the package exposed their contents to plain view and made it unnecessary for FBI agents to open the packages, there was no governmental search when the FBI viewed their contents. Except in such circumstances, I do not understand how a third party's inspection of a package's contents "could be so complete that there would be no additional search by the FBI when it re-examines the materials,"ante,at 659, n. 14.

MR. JUSTICE BLACKMUN, with whom the CHIEF JUSTICE, MR, JUSTICE POWELL, and MR. JUSTICE REHNQUIST join, dissenting.

The Court at least preserves the integrity of the rule specifically recognized long ago in Burdeau v. McDowell, 256 U.S. 465 (1921). That rule is to the effect that the Fourth Amendment proscribes only governmental action, and does not apply to a search or seizure, even an unreasonable one, effected by a private individual not action as an agent of the Government or with participation or knowledge of any government official.

I disagree with MR. JUSTICE STEVENS' opinion parsing of the cases " bizarre facts" see ante, at 651, to reach a result that [477 U.S. 649,663] the Government's screening of the films in question was an additional and unconstitutional search. The facts, indeed unusual, convince me that, by the time the FBI received the films, these petitioners had no remaining expectation of privacy in their contents.

The cartons in which the films were contained were shipped by petitioners via Greyhound, a private carrier, to a fictitious addressee, and with the shipper fictitiously identified. The private examination of the packages by employees of L'Eggs

Products, Inc. whom Greyhound innocently asked to pick up the packages, revealed that they contained film and that the films were of an explicit sexual nature. This was obvious from the drawings and labels on the containers, drawings that MR. JUSTICE STEVENS opinion describes as "suggestive", and descriptions he refers to as "explicit." Abte, at 652. The containers thus clearly revealed the nature of their contents. See 592 F.2d 788, 793-794, and n. 5 (CA5 1979). The opinion acknowledges that "there was nothing wrongful about the Government's acquisition of the packages or its examination of their contents to the extent that they had already been examined expansion of the search that had been conducted previously by a private party," ante, at 657, the opinion seems conveniently to have overlooked the fact that the FBI received the film cartons after they had been opened, and after the film's labels had been exposed to the public.

I agree with the conclusion reached by the Court of Appeal's majority:

" Under these circumstances, since the L'Eggs employee so fully ascertained the nature of the films before contacting the authorities, we find that the FBI's subsequent viewing of the movies on a projector did not change the nature of the search and was not an additional search [477U.S. 649, 664] subject to the warrant requirement". 592 F. 2d, at 793-794.

The STEVENS opinion's contrary conclusion apparently is based on the view that petitioners had a legitimate expectation of privacy in the contents of these films , which they had protected by sealing them securely in the proverbial "plain brown wrapper," that was "frustrated" only " in part," ante, at 659, by the earlier private search. 2 But it seems to me that the opinion ignores the fact that the partial frustration of petitioners' subjective expectation of privacy was directly attributable to their own actions. The District Court described it well when it ruled:

" And it seems to me, under the circumstances of this case, that shipping or causing or suffering to be shipped by a common

carrier, namely, Greyhound Bus Lines, with fictitious name given for the shipper as well as the fictitious name given for the consignee or addressee, [477 U.S. 649, 665] amounts to a relinquishment or abandonment of any reasonable expectation of privacy.

"Or, stated another way, it seems to me that it was reasonably foreseeable in those circumstances that what actually occurred would occur. That is to say, that there was substantial likelihood that the material would be misdelivered and fall into the hands of some third party, as actually happened in this case, where it would be opened and its privacy, if it had any, invaded." App. 37-38, quoted in part in part in 592 F. 2d, at 791.

Given the facts , and the STEVENS opinion's based thereon, I cannot help but wonder at the concession that " if a gun case is delivered to a carrier, there could then be no expectation that the contents would remain private". Ante,at 659n. 12. The films in question were in a state no different from MR. JUSTICE STEVENS' hypothetical gun case when they reached the FBI. Their contents were obvious from " the condition of the package," ante, at 658, n.12, and those contents had been exposed as a result a purely private search that did not implicate the Fourth Amendment. Moreover, it was petitioners' own actions that made I t likely that such private search would occur. The opinion fails to explain, at least to my satisfaction, why petitioners' subjective expectation of privacy at the time they shipped the films, rather than at the time the films came into possession of the FBI (with the resulting protection of constitutional safeguards from unreasonable governmental action), controls this inquiry. Any subjective expectation of privacy on the part of petitioners was undone by that time by their own actions an the private search. In any event, it was abandoned by their shunning the property, under the circumstances of these cases, for over 20 months. 3[447 U.S. 649, 666]

We tend occasionally to strain credulity and to spin the thread of argument so thing that we depart from the commonsense approach to an obvious fact situation. It seems to me to be beyond the limits of sound precedent to exclude the evidence of petitioners crimes in the face of the "bizarre" developments that transpired here, developments that petitioners brought upon themselves. But the cases are strange and particular ones. The margin for reversal is narrow, and I rest assured that sound constitutional precepts will survive the result the Court reaches today.

I would affirm the judgments of the Court of Appeals.

[Footnote 1] The Court of Appeals noted, 592 F.2d, n. 6, and placed some reliance on, the observations of Judge William H, Webster in dissenting opinion in United States v. Haes, 551 F.2d 767 (CA8 1977):

" Can it be seriously argued that an agent receiving a suspected book or magazine from a freight carrier employee could not reasonably open the publication and peruse its pages to determine whether its contents offended the law?...Would a government agent who used a magnifying glass or other mechanical aid to identify an object be vulnerable to a claim of an unreasonable search independent of the lawful private search which produced the object? I think clearly not.

" The film in this case was not a means of concealing something else. In looking at the film through a projector, the agents did no more than view the motion pictures in the manner in which they were intended to be viewed. " Id. at 772-773 (footnote omitted)

The present cases are even stronger ones for recognizing the legality of the Government's projection of the film than the case Judge Webster posed. When the FBI screened these films, they already were aware of the nature of their contents.

[Footnote 2] In contrast, I am at a loss to explain the conclusion stated in MR. JUSTICE WHITE'S opinion, ante, at 662, that even "a private screening of the films would not have destroyed petitioners' privacy interest in them."

[Footnote 3] All this is reinforced by the impracticalities the Court would impose upon the FBI in these cases. The STEVENS opinion both insist that a warrant be served? Surely, not on L'Eggs Products,Inc., which no longer had possession and wanted only to wish these films a speedy good riddance. And surely not on the shippers, who purposefully had concealed their identities. [477U.S. 649,667]